

saying that she would have defended this very statute, the Solomon amendment, in the way that Solicitor General Paul Clement did. I note that Paul Clement is one of the former Solicitors General endorsing Dean Kagan's nomination.

When Dean Kagan's nomination came up for a vote in the Judiciary Committee, I joined the ranking member, Senator SPECTER, in passing because of concerns that she had been insufficiently forthcoming in answering questions during her hearing and written questions afterward. I applaud Senator SPECTER for pursuing this, for meeting with Dean Kagan again, and for pushing her for more information and more thorough answers. She has provided some additional insight into her views, though I respect the fact that her additional effort will not satisfy everyone.

All in all, I have concluded that I can support Dean Kagan's nomination. She is qualified to serve as Solicitor General and I have not seen enough to overcome the basic deference that I believe I must give the President. As such, I will vote to confirm her.

Mr. KYL. The nomination of Elena Kagan to be Solicitor General of the United States is not without controversy. She has a stellar academic record which has been discussed. Following law school, Ms. Kagan served as a judicial clerk for Judge Abner Mikva on the U.S. Court of Appeals and for Supreme Court Justice Thurgood Marshall. After her clerkships, Ms. Kagan joined the DC law firm Williams and Connolly.

Ms. Kagan left private practice to join the faculty of the University of Chicago Law School. In 1995, Ms. Kagan began her service in the Clinton administration as associate counsel to the President and later as deputy assistant to the President for Domestic Policy. In 1999, she left the White House and returned to legal academia, joining the faculty at Harvard Law School. In 2003, Ms. Kagan was named Dean of Harvard Law School, a role in which she was charged with overseeing every aspect of the institution, academic and non-academic alike.

She is well regarded by those who have followed her career.

I am particularly troubled, however, by two matters. First, Dean Kagan's nomination has rightfully received criticism because of her stance on the Solomon amendment. Dean Kagan joined two briefs concerning the legality of the Solomon amendment, one on an amicus brief to the Third Circuit in support of the appellants, *FAIR*, in the case *FAIR v. Rumsfeld*, and the other an amicus brief in support of *FAIR* when the case reached the Supreme Court. By a vote of 9 to 0, the Supreme Court upheld the Solomon Amendment and rejected the argument presented in the brief that Dean Kagan signed. See *Rumsfeld v. FAIR*, 547 U.S. 47, 55–57, 2006. Also, I would like to make one comment about Dean Kagan's actions as dean in this case. As Senator SES-

SIONS pointed out earlier today, because the case was appealed to the Supreme Court, the Third Circuit stayed enforcement of its decision. Therefore, the Solomon amendment stayed in effect. Dean Kagan acknowledged this in a September 20, 2005, email to the Harvard Law School community, where she admitted that she had barred the military from campus even though no injunction was in place: "Although the Supreme Court's action [granting review] meant that no injunction applied against the Department of Defense, I reinstated the application of our anti-discrimination policy to the military . . . as a result, the military did not receive [Office of Career Services] assistance during our spring 2005 recruiting season." Thus, Ms. Kagan barred the military from recruiting on campus even though the Solomon amendment remained the law of the land.

Second, I am troubled by Dean Kagan's lack of appellate experience. She has not argued even a single case before the Supreme Court or before any federal or state appellate court. I am quite concerned about her complete lack of appellate advocacy. I am, nevertheless, willing to give her the benefit of the doubt, primarily because of the views of seasoned advocates who know her well and who know the Court well.

All three Solicitors General appointed by President Bush—Ted Olson, Paul Clement, and Greg Garre—signed a letter, January 27, 2009, stating that they "are confident that Dean Kagan will bring distinction to the office, continue its highest traditions and be a forceful advocate for the United States before the Supreme Court." They added, "[h]er brilliant intellect will be respected by the Justices, and her directness, candor and frank analysis will make her an especially effective advocate."

Additionally, among her other supporters are two highly respected conservative lawyers who have known Dean Kagan since the beginning of her legal career. The first is Peter Keisler, who served as Acting Attorney General under President Bush and held a number of other top positions in the Bush Justice Department. He clerked on the U.S. Supreme Court with Elena Kagan, and wrote the following in support of her nomination, January 30, 2009: "[her] combination of strong intellectual capabilities, thoughtful judgment, and her way of dealing respectfully with everybody . . . are . . . among the many reasons she will be a superb Solicitor General, and will represent the government so well before the Court."

Second, Miguel Estrada has known Elena Kagan since law school. He wrote in support of her nomination, January 23, 2009: "Having worked as an attorney in the Solicitor General's Office under Solicitors General of both parties, I am also confident that Elena possesses every talent needed to equal the very best among her predecessors."

I expect a Solicitor General nominated by a President of a different po-

litical party to hold views that diverge from my own; but I also expect that nominee to be qualified for the position, able to faithfully execute the responsibilities of the office, and be forthright and honest with members of Congress. She has assured us that her ideology will not interfere with her decisions as Solicitor General. I will closely follow Dean Kagan's tenure as Solicitor General. I will hold her to her commitments.

I would like to make clear that my vote for Dean Kagan is only for the position of Solicitor General, and my vote does not indicate how I would vote for her if she were nominated for any other position, especially a position that is a lifetime appointment. Specifically, according to numerous news accounts, Dean Kagan is expected to be considered for nomination to the Supreme Court if an opening were to occur during the Obama administration. If she were nominated, her performance as Solicitor General would be critical in my evaluation of her suitability for the Supreme Court. My decision whether to support or oppose her would be strongly influenced by the decisions made by her as Solicitor General, such as the cases for which she does and does not seek review, the positions she argues, and the bases for her arguments. If she approaches her job as Solicitor General ideologically or argues inappropriate positions, I will not hesitate to oppose her nomination.

Mr. WHITEHOUSE. Mr. President, I wish to urge my colleagues to support the nomination of Elena Kagan to be the Solicitor General. In doing so, I will make four brief points.

First, Dean Kagan is extraordinarily qualified as a lawyer with a profound understanding of the issues that dominate the Supreme Court's docket. She has received enormous praise for her leadership of Harvard Law School as dean, in which position she reinvigorated one of the premier legal institutions in our country. And of course Dean Kagan is a scholar of the highest order on questions of administrative and constitutional law. She clearly has the intellectual background and sharp intelligence necessary to represent the interests of the United States with the utmost skill and clarity. She testified in her hearing and in numerous followup questions that she will put the interests of the United States ahead of any of her own beliefs and defend congressional statutes with the vigor and force we expect of the office. She has worked in private practice, as a clerk to the Supreme Court, and as a counsel in the White House. I applaud her willingness to return to Government service. Now, some critics have pointed out that she has not argued before the Supreme Court before. As an attorney who has argued before that Court, I can attest that appearing before the Court indeed is a daunting experience. But Solicitors General Ken Starr, Charles Fried, Robert Bork, and Wade McCree similarly had not argued before the